Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

MORRIS HERRING, RAYMOND HERRING, JAMES N. CORBETT, LUIS VALENZUELA, ARMANDO ALFARO, and SHERMAN MONTGOMERY,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Petitioners maintain standing in federal court to bring a Rule 60(b) independent action to set aside a judgment for fraud on a court where:

(a) The Rule 60(b) independent action sought to set aside a state court judgment for fraud on the state court;

(b) The Petitioners bringing the Rule 60(b) action were parties in the underlying state court action against whom the judgment was entered;

(c) The Rule 60(b) action was filed in the state court that entered the judgment sought to be set aside;

(d) The FDIC, the party alleged to have committed the fraud on the state court while acting in its capacity as a court appointed receiver, removed the Rule 60(b) action to federal court thereby enjoining the state court from setting aside its own judgment for fraud perpetrated on it; and

(e) Relying on portions of the judgment sought to be set aside, the Court of Appeals found that the Petitioners lacked a financial interest in the outcome of the Rule 60(b) action.

2. Where there is a substantial issue of fraud on the court, did the Court of Appeals err in relying on portions of the alleged fraudulent state court Judgment sought to be set-aside in ruling that the shareholders lacked a financial interest in the Rule 60(b) action?

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Appendix A — Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit Filed December 26, 1995 ..... 1a

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OPINIONS BELOW

The amended opinion of the Court of Appeals is reported at 82 F.3d 282 and is reproduced in the Appendix filed herewith ("App.") A. The original opinion of the Court of Appeals, 72 F.3d 762 (superseded on denial of rehearing) is reproduced at App. B. The unreported opinions of the district court in this case (1) granting the FDIC's motion for summary judgment against Petitioners, and (2) denying the FDIC's motion to dismiss for lack of subject matter jurisdiction are reproduced at App. C, and D, respectively.

STATEMENT OF JURISDICTION

The Court of Appeals filed its original order and opinion on December 26, 1996. On April 19, 1996, in response to a timely filed petition for rehearing and suggestion for rehearing en banc, the Court of Appeals filed an order and amended opinion and denied the petition for rehearing and rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED

Federal Rule of Civil Procedure 60(b) provides in pertinent part as follows:

> Rule 60. Relief From Judgment or Order
>
> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms

> as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, . . . or to set aside a judgment for fraud upon the court. [1]

Title 12 U.S.C. § 1819(b)(2)(B) of the Federal Deposit Insurance Act provides in pertinent part as follows:

> Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party.

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1. In pertinent part, Fed. Rule 60(b) is identical to its Arizona state counterpart, 16A.R.S. Rules Civ. Pro. 60(c) upon which Petitioners filed their independent action in the same state court that rendered the judgment sought to be set aside.

Title 28 U.S.C. § 1446(d) pertaining to the removal of cases from state court provides as follows:

> (d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

Title 28 U.S.C. § 1450 pertaining to the removal of cases from state court provides in pertinent part as follows:

> All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.

The Anti-Injunction Act, title 28 U.S.C. § 2283 provides as follows:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Arizona Revised Statutes § 6-395.02 concerning the liquidation and dissolution of state banking institutions provides as follows:

> If the court grants the application for receivership of a bank it shall first tender the appointment as receiver to the Federal Deposit Insurance Corporation, which is authorized to qualify and act without bond. If the corporation accepts the appointment it shall have all of the powers, privileges and duties as such receiver provided by the laws of the this state except insofar as such powers, privileges and duties are in conflict with the provisions of the Federal Deposit Insurance Act as amended, which act shall control. If the corporation does not accept the appointment, the superintendent shall be appointed receiver.

A.R.S. § 6-395.02.

Arizona Rule of Civil Procedure 66(c) governing receivers provides as follows:

> 1. The receiver may, subject to control of the court, commence and defend actions. He shall take and keep possession of the property, receive rents, collect debts and perform such other duties respecting the property as authorized by the court.
>
> 2. The court may at any time suspend a receiver and may, upon notice, remove a receiver and appoint another.
>
> 3. A receivership may be terminated upon motion served with at least ten days notice upon all parties who have appeared in the

> proceedings. The court in the notice of hearing may require that a final account and report be filed and served, and may require the filing of written objections thereto. In the termination proceedings, the court shall take such evidence as is appropriate and shall make such order as is just concerning its termination, including all necessary orders on the fees and costs of the receivership.
>
> 4. In all matters relating to the appointment of receivers, to their powers, duties and liabilities, and to the power of the court, the principles of equity shall govern when applicable.

Ariz. Rules Civ. Proc., Rule 66(c).

Title 12 U.S.C. § 1821(d), (15)(A)(B)(C) of the Federal Deposit Insurance Act provides as follows:

> (15) Accounting and record keeping requirements
>
> (A) In general
>
> The Corporation as conservator or receiver shall, consistent with the accounting and reporting practices and procedures established by the Corporation, maintain a full accounting of each conservatorship and receivership or other disposition of institutions in default.
>
> (B) Annual accounting or report

> With respect to each conservatorship or receivership to which the Corporation was appointed, the Corporation shall make an annual accounting or report, as appropriate, available to the ... authority which appointed the Corporation as conservator or receiver.
>
> (C) Availability of reports
>
> Any report prepared pursuant to subparagraph (B) shall be made available by the Corporation upon request to any shareholder or the depository institution for which the Corporation was appointed conservator or receiver or any other member of the public.

STATEMENT OF THE CASE [2]

In September 1981, the Arizona Superintendent of Banks placed Southwestern Bank (Southwestern) in receivership. On May 1, 1990, the FDIC as court-appointed receiver petitioned the Arizona Superior Court to enter an order approving payment of a final liquidating dividend, payment of interest on claims, sale of any newly discovered assets, disposal of Southwestern's books and records, and termination of the receivership. App. A, 5a.

Petitioners, a group of Southwestern shareholders,

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2. Citations for the Statement of the Case are made to the Ninth Circuit's published amended opinion in this case, to the appendix, or to Petitioner's Excerpts of Record ["ER"] filed with the Ninth Circuit. Citations to the Excerpts of Record are for case background information only.

(hereinafter "shareholders") filed objections pursuant to state statutory law. 16 A.R.S. Rules Civ. Pro., Rule 66(c). The shareholders complained of faulty accounting and insufficient information, and in particular, an alleged $530,124 loss to the receivership. The shareholders requested the court to order a more specific accounting or allow the shareholders leave to examine the receivership records. App. A, 5a.

The $530,124 loss represented 11.2% of the total $4,749,284 in receivership assets. [ER 74,78]. After hearings and the filing of post-petition briefs, the Arizona Superior Court overruled the shareholders' objections. The court held that the disputed item of $530,124 consisted of losses sustained on the liquidation of assets and that the FDIC was not subject to a surcharge for this amount. The court further held that the FDIC was entitled to interest on its own claims but that the receivership funds were insufficient to pay the interest. The court opined that insufficient funds existed to pay the FDIC's interest claims even if the $530, 124 were disallowed. The state court did not engage in any interest calculations with regard to the $530,124 alleged loss. The court held that the FDIC did not violate any fiduciary duties as receiver. On August 14, 1991, the court terminated the receivership. App. A, 5a; App. E, 44a-46a.

On appeal, the shareholders raised issues of fraud concerning the FDIC's reported loss of $530,124 and of its trial and post-trial explanations for the loss. The Arizona Court of Appeals granted the FDIC's motion to strike portions of the shareholders reply brief alleging fraud as issues newly raised on appeal. The Court of Appeals affirmed the trial court's decision.

The shareholders petitioned for review before the Arizona Supreme Court and asserted the FDIC perpetrated a fraud on the trial court. The Arizona Supreme Court denied the petition for review. App. A, 6a.

The shareholders then filed in Arizona Superior Court this independent action pursuant to Rule 60(b) to set aside the judgment for fraud on the court. The FDIC removed the case to federal court with a concurrent motion to dismiss for lack of subject matter jurisdiction. The motion to dismiss was denied. App. D, 43a.

The shareholders' Rule 60(b) action alleged that the FDIC (1) knowingly submitted false accounting figures when it petitioned the court to terminate the receivership; (2) submitted false final summary statements of the income and liquidation losses for the liquidated assets of Southwestern; (3) presented perjured testimony to the court claiming the $530,124 loss resulted from uncollectable judgments taken on receivership loan assets; (4) submitted false documentation after the hearings were closed to substantiate the $530,124 loss; and (5) submitted a false affidavit by an FDIC employee in support of its post-trial documentation regarding the $530,124 loss. App. A, 6a; [ER 31-33].

The FDIC's post-hearing documents listed 26 judgments that it claimed comprised the $530,124 loss. The FDIC submitted the judgment documentation in support of its trial testimony where it claimed that the $530,124 loss was the resulted of uncollectable judgments that it sought and obtained on defaulted receivership loan assets. [ER 31-35].

The shareholders Rule 60(b) action alleged that the FDIC neither sought nor obtained most of the 26 judgments as it claimed. The shareholders alleged that most of the underlying loans were charged off as losses prior to the receivership and that these loans were never receivership assets. [ER 34-35].

As examples, the shareholders focused specifically on several of the alleged judgments losses the FDIC claimed made

up the total $530,124 loss. The shareholders alleged that the FDIC's reported $154,000 loss against bank debtor League of United Latin American Citizens ("LULAC") was a loan written off by Southwestern five years prior to the closing of the bank. The Shareholders alleged that the LULAC judgment was taken by Southwestern two and a half years prior to its closing. The shareholders further alleged that the FDIC failed to report a collection of $40,000 on the LULAC judgment instead reporting a recovery of only $16.90. [ER 74-110].

The FDIC moved for summary judgment claiming the shareholders action was barred by res judicata and collateral estoppel. The FDIC further claimed that there were no genuine issues of material fact, although it did not address the disputed $530,124 loss.

The shareholders responded to the summary judgment motion by submitting the affidavit of their expert witness, William C. Gormley, in support of their fraud allegations. [ER 74-110]. Mr. Gormley's expertise is founded on his 16 year tenure with the FDIC as both an examiner and as an instructor educating senior FDIC personnel.

After examining all the FDIC's accounting documentation submitted to the state court, Mr. Gormley concluded that the receivership did not sustain the $530,124 loss and that the FDIC gave several inconsistent and irreconcilable explanations for the loss, none of which were legitimate. [ER 74-110]. The FDIC did not challenge Mr. Gormley's qualifications, expertise, or factual analysis and conclusions concerning the alleged $530,124 loss and other aspects of the receivership.

The district court granted summary judgment on the grounds that *res judicata* and collateral estoppel barred the shareholders' Rule 60(b) action and finding that the FDIC

committed no fraud on the court. App. C, 21a-38a. In finding no fraud, the district court did not dispute any aspect of Mr. Gormley's affidavit. [3]

On appeal from the district court's order granting summary judgment, the Ninth Circuit affirmed without reaching the merits of the appeal. The court held that the shareholders lacked a financial interest in the outcome of the litigation and therefore lacked standing to maintain the action. App. A, 7a.

In finding that the shareholders maintained no financial interest, the Ninth Circuit relied on the following figures and calculations:

When the FDIC applied for an order terminating the receivership nine (9) years after its inception, approximately $367,000 was available for distribution. The $367,000 was available after the FDIC had paid 100% of all claims against Southwestern and had paid itself $883,282 in liquidating fees and expenses. In addition to its $883,282 in expenses, the FDIC

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3. The district court stated that Mr. Gormley merely questions whether there was an actual $530,124 loss: "Gormley's criticism is nebulous and imprecise . . ." App. C, 32a-33a. Mr. Gormley's actual conclusions are as follows:

> (1) At this time, and after examining all of the aforementioned documents, I cannot find any legitimate basis for the $530,124 loss. [ER 79].
>
> (2) The $530,124 loss was simply not a legitimate loss to the receivership. [ER 81].
>
> (3) It is my conclusion that the FDIC cannot legitimately explain its reported $530,124 loss to the receivership. [ER 83].

claimed an additional approximate $1,500,000 in interest claims owed to it.

The available $367,000 was insufficient to pay the $1,500,000 in interest, and left a deficiency of $1,133,000 in interest owed to the FDIC. Based on these figures, the Ninth Circuit concluded that, even if the disputed $530,124 loss was disallowed, there would still remain a deficiency of $603,000. App. A, 7a.

REASONS FOR GRANTING THE WRIT

First, under the particular circumstance of this case, the denial of standing and refusal to adjudicate the case by a *federal appellate court* raises exceptionally important issues of comity, federalism, and the abstention doctrine. This was an action filed by the shareholders in state court to set aside a state court judgment for fraud upon that same state court. The shareholders were parties in the underlying proceedings in which the judgment was entered. Federal jurisdiction was invoked by the FDIC under its right of removal, which thereby enjoined the state court from investigating the fraud itself.

The *enjoined* state court must now rely on the federal court to safeguard its judicial process unless the federal court remands the case back to the state court. The federal court has done neither, thereby preventing the adjudication of the fraud on the court claims altogether. By denying standing and declining to exercise its inherent authority to adjudicate the merits of this case, the federal court effectively denies the state court its right to redress for an alleged fraud committed upon it.

If the federal court is refusing to adjudicate the merits of a removed state case under these circumstances, then it should abstain entirely and remand the case back to state court. Consistent with the principles of "comity" and "federalism,"

remanding the case will allow the state court to determine for itself whether it desires to exercise its own inherent power to investigate the fraud alleged to have been committed against it. It cannot be reasonably disputed that the fraud issues involved in this case are matters of purely state court concern. The Ninth Circuit's original opinion reflects this point:

> Perhaps a court has inherent power to investigate fraud perpetrated on itself, but a court should not sue sponte investigate fraud on another court when no interested party or nonparty has requested the investigation.

App. B, 20a.

Second, the shareholders standing to bring a Rule 60(b) action derives from their standing in the underlying proceedings. The Ninth Circuit disregards the fact that the shareholders were parties in the underlying action and requires new independent grounds for maintaining standing to set-aside the judgment entered against them. Moreover, in finding that the shareholders have no current financial interest, the Ninth Circuit relies on portions of the judgment sought to be set aside. The Ninth Circuit has improperly used the judgment, as it currently stands, to deny standing to set aside that judgment.

Certiorari in appropriate to address the exceptionally important issues raised herein.

I.

EVEN IF THE SHAREHOLDERS' FINANCIAL INTERESTS IN THE UNDERLYING LITIGATION ARE UNCERTAIN, THEY SHOULD BE AFFORDED STANDING BASED ON THEIR STANDING IN THE UNDERLYING ACTION OR, ALTERNATIVELY, AS FRIENDS OF THE COURT.

A. It Is The Nature Of The Fraud And Its Corresponding Harm To The Integrity Of The Judicial Process, And Not The Financial Interest Of The Litigants That Determines Whether A Court Should Exercise Its Inherent Powers To Set Aside A Judgment For Fraud On The Court.

Relying on *Root Refining Co. v. Universal Oil Prods. Co.*, 169 F.2d 514, 521-522 (3d Cir. 1948), and *Alexander v. Robertson*, 882 F.2d 421, 425 (9th Cir. 1989) the Ninth Circuit holds that the inherent power of a court to inquire into the integrity of judgments should not be exercised unless there exists a financially interested party. App. A, 10a. Neither *Root* or *Alexander* so limit the power of court.

In the *Alexander* case, the fraud involved only the unlicensed practice of law before the district court. There was no evidence that this conduct was designed to improperly influence the court in its decision. The court further stated that, without more, the unlicensed practice of law would not inhibit courts from adjudging cases impartially. Accordingly, the court held that setting aside the judgment in the underlying case was an inappropriate sanction where no financial interests were a stake:

> We thus agree with the district court that setting aside the judgment on Robertson's Rule 60(b) motion is an inappropriate

> sanction under these circumstances *because it will neither protect the integrity of the judicial system nor vindicate the interest of a party victimized by the unlicensed practice of law.* As discussed in part II above, Robertson cannot succeed on his cross-claims against Fraser and Protective. In essence, then, setting aside the judgment would be a "fruitless" gesture that would hardly bolster the public's perception of the judicial process. In addition, because none of the parties were aware of Warren's misconduct, vacating the judgment would "punish" parties who are in no way responsible for the "fraud." Finally, there are other remedies available to protect the judicial system from this type of misconduct. Indeed, the district court has already issued an order requiring Warren to show cause why he should not be subjected to disciplinary proceedings. . . . As did the district court below, we believe recourse to these proceedings would operate adequately to convey the message to the public that the courts will not tolerate this type of misconduct.

Alexander v. Robertson, 882 F.2d at 425 (emphasis added).

The *Alexander* opinion correctly illustrates two independent bases for setting aside a judgment for fraud upon the court: (1) to protect the integrity of the judicial system, and/or (2) to vindicate the interests of a party victimized by the fraud. The court declined to set aside the judgment in the *Alexander* case because *neither* basis was found to exist.

The issue of whether a court should exercise its inherent

powers does not even arise unless the party questioning the integrity of the judgment lacks standing. *A fortiori*, a court's decision whether to exercise its inherent powers cannot rest on the existence of a party's current lack of a financial as the Ninth Circuit holds. Rather, where the party lacks standing, it is the harm to the judicial process that calls upon the court to *sue sponte* investigate the fraud and to set aside a judgment for fraud upon the court. The *Root* case, as well as *Alexander*, buttress this conclusion.

In *Root Refining v. Universal Oil Products*, 169 F.2d 514, 521-522 (3rd Cir. 1948), the court specifically rejected the argument that the lack of a present justiciable case or controversy precludes the court from inquiring into the integrity of its own prior judgments:

> This argument completely ignores the inherent power of a court to inquire into the integrity of its own judgments. Such a judgment implies the *prior* existence of a justiciable case or controversy between opposing litigants; but when the controversy has been terminated by a judgment, its freedom from fraud may *always* be the subject of further judicial inquiry; and the general rule that courts do not set aside their judgments after the term at which they were rendered has *no application*. The matter is *not* one of merely private concern subject to the action or inaction of the litigants, but is one of vast public importance, so that it becomes immaterial that the injured party may have been derelict in bringing the fault to the court's attention. . . .

(Emphasis added).

The Third Circuit in *Root* relied on two Supreme Court opinions that also recognize the overriding concerns for the integrity of the judicial process, which takes precedent over otherwise preclusive limitations on the right to maintain post-judgment actions. *See Universal Oil Co. v. Root RFG. Co.*, 328 U.S. 575 (1946); *Hazel-Atlas Glass Co. v. Harford Empire Co.*, 322 U.S. 238, 246 (1944). In *Universal Oil*, the court stated as follows:

> The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question. *Hazel-Atlas Co. v. Harford-Empire Co.*, 322 U.S. 238. The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. . . .
>
> . . . No doubt, a court that undertakes an investigation of fraud upon it may avail itself, as did the court below, of *amici* to represent the public interest in the administration of justice. . . .

Universal Oil Co. v. Root RFG. Co., 328 U.S. at 581.

The opinion in *Hazel-Atlas Glass* is often quoted by litigants and lower courts when addressing the issue of fraud on the court. In that opinion, this Court made clear that the relevant consideration was not the parties but the integrity of the judicial process:

> . . . This matter does not concern only private parties. These are issues of great moment to

> the public in a patent suit. (citations) Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public justice demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Hazel-Atlas Glass, 322 U.S. at 246, 64 S. Ct. at 1001.

Based on the foregoing cases, including the *Root* and *Alexander* cases cited in the Ninth Circuit's opinion, the Ninth Circuit should have reached the merits of the shareholder's appeal. Even if the court were correct that the shareholders lacked a financial interest in the outcome of this litigation, it cannot dismiss the fraud allegations without first considering whether or not the type of fraud alleged subverts the integrity of the judicial process. Had the court done so, it would have been compelled, at the very least, to treat the shareholders as *amici* and reach the merits of the appeal.

In the instant case, it cannot be seriously challenged that the fraud alleged, if true, subverted the integrity of the state court receivership proceedings. The FDIC was appointed by the Arizona Superior Court to act as the receiver of a state bank under A.R.S. § 6-395.02. The fraud allegations are founded on the

undisputed facts that (1) in the prior state proceedings, the FDIC was acting in its capacity as the court appointed receiver of a state bank; (2) the alleged acts of fraud were to committed by the FDIC while operating in its capacity as the court appointed receiver; and (3) the court relied on the representations made by the FDIC in order safeguard to interests of the depositors, creditors, shareholders, and other parties with claims against the receivership and to make appropriate rulings and orders with respect to these parties.

A receiver appointed by the court under § 6-395.02 maintains the status of a common law receiver. *See Stowel v. Arizona Savings and Loan Association*, 93 Ariz. 310, 380 P.2d 606 (1963). A receiver is merely a ministerial *officer of the court* acting under its direction for the benefit of all parties in interest. *Stowel*, 93 Ariz. at 311; *Midway Lumber, Inc. v. Redman*, 4 Ariz. App. 471, 421 P.2d 904 (1967). Further, the receiver is a trustee or fiduciary.

Given the FDIC's position of trustee, fiduciary to the court, and officer of the court, any acts of fraud committed by it in its capacity as a court appointed receiver constitutes a fraud upon the court, which subverted the integrity of the judicial process and the receivership proceedings in particular.[4] *Accord, Matter of Tudor Associates, Ltd., II*, 64 B.R. 656 (E.D.N.C. 1986).[5]

Based on the foregoing, the shareholders respectfully request that this Court grant certiorari to consider the Ninth

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4. Concerning the specific allegations of fraud, the shareholders refer the court to their Opening Brief to the Ninth Circuit at pages 4-8, and 25-29; the affidavit of their expert witness, William C. Gormley [ER 74-110]; and their Reply Brief at pages 5-7.

5. The *Matter of Tudor Associates, Ltd.* case is addressed at length in Appellants' Ninth Circuit Opening Brief at pages 18-19.

Circuit's determination that a financial interest of a party is required before a court should exercise its inherent power to set aside a judgment for fraud upon the court.

B. Because This Action Was Removed From The State Court In Which It Was Brought, The Federal Court Must Act In Place Of The State Court And Presume The State Court Would Have Exercised Its Inherent Power To Inquire Into Its Own Judgment.

In its original opinion, the Ninth Circuit distinguishes *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946) stating as follows:

> Perhaps a court has inherent power to investigate a fraud perpetrated on itself, but a court should not sue sponte investigate fraud on another court when no interested party or nonparty requested the investigation.

App. B, 20a.

This holding ignored the fact that the shareholders did not ask the federal court to set aside the state court judgment. The FDIC removed the case to federal court after the shareholders filed it in the same state court where the alleged fraud was perpetrated. Removal was based not on a federal question but on 12 U.S.C. § 1819(b)(2). Section 1819(b)(2) confers federal jurisdiction solely by virtue of the fact that the FDIC is a party.

The removal of the case enjoined the state court from taking any further action and effectively prevented it from setting side its own judgment. 28 U.S.C. § 1446(d) ("the State court shall proceed no further unless and until the case is remanded.") The

state court must, therefore, now rely on the federal court to safeguard the integrity of its judicial process.

In its original opinion ruling that the federal court should not exercise its inherent powers to investigate a fraud on the state court where no financially interested party has so requested, the Ninth Circuit effectively abstained from exercising the jurisdiction conferred under 12 U.S.C. § 1819(b)(2). Yet, the court dismissed the case entirely rather than remand it back to the state court to determine for itself whether to exercise its own inherent powers to investigate the fraud, and to grant standing to the shareholders, which they enjoyed in underlying receivership proceedings.

In its Amended Opinion filed in response to the Petition for Rehearing raising the issues of abstention and remand, the Ninth Circuit simply deleted the above quoted language from the original opinion. Rather than confronting the issues of abstention and remand, the Ninth Circuit retreated from its statement that a court maintained the inherent power to investigate a fraud perpetrated on itself. (App A, 10a; App. B, 20a).

Consistent with the principles of comity and federalism, the Ninth Circuit should have either proceed to the merits of the appeal or order the case remanded back to the state court. To do neither gives the FDIC exactly what it sought in the first place: to utilize the removal statutes to prevent an adjudication of the fraud allegations altogether.

When the FDIC removed the case to federal court, it filed a concurrent motion to dismiss the action alleging that the district court lacked subject matter jurisdiction. The district court denied the motion finding that any lack of jurisdiction was based on a

state rule of procedure, which was inconsistent with the federal rules. Applying the test enunciated in *Hanna v. Plumer*, 380 U.S. 460 (1965), the district court held that there would be no substantive difference in the outcome of the case by applying the federal rule. The court further pointed out that to grant the FDIC's motion would effectively allow them to "forum shop" and encourage them to race into the federal court simply to dismiss the matter "altogether." App. D, 42a.

On appeal to the Ninth Circuit, the FDIC again sought to prevent the adjudication of the case *altogether* by arguing that the Anti-Injunction Act, 28 U.S.C. § 2283, precludes the federal court from enjoining the enforcement of the state court judgment. The FDIC's argument omitted the determinant fact that it removed the case from the state court, thereby rendering section 2283 inapplicable. The FDIC simply ignored the many opinions, including the Ninth Circuit's own *Butner v. Neustadter*, 324 F.2d 783, 785-786 (9th Cir. 1963), which all hold that federal courts may set aside state court judgments entered before the cases were removed to federal court.[6]

The standing argument raised by the FDIC in its Summary Judgment Reply Brief to the district court is but one more in a series of arguments seeking to prevent *altogether* the adjudication of the fraud claims against it.

If the Ninth Circuit is correct that it should not involve itself in investigating a fraud on a state court unless a financially

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6. *See also, Burroughs v. Palumbo*, 871 F. Supp. 870 (E.D. Va. 1994) (Default judgment entered by state court prior to removal may be set aside by district court.); *Munsey v. Testworth Laboratories*, 227 F.2d 902, 903 (6th Cir. 1955) ("Prior to removal the state court judgment was concededly subject to being set aside in the state court. It was subject to the same hazard in the federal court after removal." 28 U.S.C.A. § 1450); *Barnett v. Southern Railway Company*, 68 F.R.D. 413 (1975).

interested party so requests, it should not thereafter prevent the matter from adjudication altogether as the FDIC would applaud. Rather, it should abstain from exercising its jurisdiction, lift the injunction against the state court, and order the case remanded back to state court.

The notion of "comity" includes a proper respect for state functions. *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 431 (1982) Proceedings necessary for the vindication of important state policies or for the functioning of the *state judicial system* also evidence the state's substantial interest in the litigation. *Id.* at 432 (citing *Trainor v. Hernandez*, 431 U.S. 434 (1977)). And where vital state interests are involved, a federal court should abstain. *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 F.2d at 432.

The determination to abstain and remand a case back to state court should be made consistent with the principles set forth in *Burford v. Sun Oil Co.*, 319 U.S. 312 (1943) and its progeny. *See also, Garamendi v. Allstate Ins. Co.*, 47 F.3d 350, 354 (9th Cir. 1995) (Remand based on abstention is appropriate where the abstention doctrine is properly invoked.).

The shareholders do not contend that the present case must be remanded to state court. They merely assert the federal court must either reach the merits of the appeal in order to safeguard the judicial process of the now enjoined state court, or order the case remanded.

II.

THE SHAREHOLDERS MAINTAIN A SUFFICIENT FINANCIAL INTEREST IN THE LITIGATION TO PROCEED TO A TRIAL ON THE MERITS.

A. The Court Improperly Relied On A Portion Of The Judgment Sought To Be Set Aside In Ruling That The Shareholders Do Not Have A Financial Interest.

In finding that the shareholders have no financial interest in the litigation, the Ninth Circuit relies on the state court's calculation of the interest owed to the FDIC, which is part of the judgment sought to be set aside. At the end of the receivership, approximately $367,000 was available for distribution. The FDIC claimed $2,500,000 in interest owed to it. The state court awarded only simple interest of no more than $1,500,000. The interest claim thus exceeded the available funds by a maximum amount of $1,133,000.

The state court then ruled that the disputed $530,124, which represents one of the principal fraud issues under the present Rule 60(b) action, was a legitimate liquidation loss and that the FDIC was not subject to a surcharge for this amount. Incidental to the state court's ruling, it opined that, even if it disallowed the $530,124 loss, there would still be insufficient funds to pay the interest owed to the FDIC. App. E, 45a.

Based on these numbers, the Ninth Circuit held that, even if the FDIC engaged in fraud, there would still be an interest deficiency in the amount of $603,000. The court would not be correct unless it assumes that the $530,000 was factored off of the books at the end of the receivership rather than at the beginning or some point in between. Otherwise, the $530,000 is subject to the same interest calculation as the funds loaned to the

receivership by the FDIC. In other words, to find a $603,000 deficiency, the court had to find that no interest is due on the $530,000 or that the interest owed to the FDIC would not be affected by factoring the $530,000 back into the calculations.

Had the Ninth Circuit calculated interest on the $530,124 at the same rate as was calculated for the FDIC (10% simple interest for nine years) it would have found an additional $477,111 for distribution. This amount would reduce the deficiency to approximately *$126,000.*

The Ninth Circuit also overlooks the fact that the alleged fraud concerns more that the disputed $530,124. There was an additional $40,000 disputed in the FDIC's summary judgment motion, which the district court declined to specifically address. There are additional amounts in dispute that were not addressed in the summary judgment motion all, and therefore were not considered by district court. The district court was within its authority to disregard all the disputed amounts because it resolved the standing issue in favor of the Shareholders, the non-moving parties in the summary judgment proceedings.

The Ninth Circuit also overlooks the fact that the FDIC spent $883,282 liquidating the assets of Southwestern. This $883,282 in fees and expense was paid out of the receivership estate and was, therefore, *born by the shareholders.* If it is determined that the FDIC committed fraud on the court in its capacity as court appointed receiver, the shareholders would have the right to challenge a substantial portion of the fees paid to the FDIC.

The Ninth Circuit holds that the shareholders maintain no financial interest in the context of affirming a summary judgment order without the shareholders ever having an opportunity to demonstrate a financial interest. The FDIC first

raised the standing issue in its Summary Judgment Reply Brief to the district court. However, it presented no evidence establishing the absence of a genuine issue of material fact. It simply relied on the state court's calculations, which are part of the judgment sought to be set aside.

In a summary judgment proceeding, it is the moving party's burden to establish the absence of genuine issues of material facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In determining whether there is a genuine issue of material fact, the evidence must be viewed in the light most favorable to the nonmoving party. *Poller v. Columbia Broadcasting System, Inc.*, 386 U.S. 464, 473 (1962).

Pursuant to it own decision in *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir. 1995), it was also improper for the Ninth Circuit to rely on the state court's calculations to deny standing in the present case. Once a fraud on the court is established as to certain aspects of a judgment, the entire judgment may be set-aside and the entire matter may be retried. *Id.* at 1133-1134. The Ninth Circuit does not address *Pumphrey* or attempt to distinguish it.

In *Pumphrey*, the district court granted a new trial in its entirety after finding that a fraud on the court had been committed affecting part of the judgment. Addressing this issue, the Ninth Circuit stated as follows:

> Thompson argues that a new trial should be limited to the issue of liability, because any fraud that occurred did not relate to the issue of damages. We disagree. Partial trials "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from others that a trial

> of it alone may be had without injustice." *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). Sparks should be given the opportunity to present a complete case, unhampered by Thompson's fraud. The district court did not abuse its discretion by ordering a new trial on all issues. *See d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886, 897 (9th Cir. 1990) (whether to limit issues in new trial is within *trial court's* discretion) (Emphasis added).

Pumphrey v. Thompson Tool Co., 62 F.3d at 1133-1134.

Based on the following factors, the shareholders would be entitled to set aside the entire judgment and retry the matter in its entirety if they prevail in proving the alleged fraud:

(1) The state court never attempted to recalculate the interest owed to the FDIC under the various scenarios in which the $530,124 loss would be factored back into the receivership accounting. There was no reason for the state court to do so after finding the loss was legitimate.

(2) The state court did not consider the additional amounts in dispute in the shareholders' action to set aside the state court judgment. These additional disputed amounts were not considered by the state court because they were discovered during post-trial investigations.

(3) After a finding that the FDIC committed fraud on the state court, the shareholders would be entitled to seek an independent audit of the receivership, so that the court could then accurately determine the funds available and who is entitled to them. The decision to order an independent audit cannot be made

until the fraud allegations are litigated and the extent of the fraud is assessed.

(4) Where the FDIC has committed a fraud on the court, the shareholders are entitled to a new ruling on whether the FDIC is entitled to its fees and expenses of $883,282, which were paid by the shareholders. The shareholders would also be entitled to challenge the interest claims that accrued over a nine year period.

Contrary to the Ninth Circuit's opinion, the shareholders do not rely on "vague" public interest for the state court's authority to deny the FDIC's expenses or interest claims. Rather, in matters relating to the appointment of receivers, Arizona state law specifically provides that the power of the court shall be governed by "the principles of equity." 16A.R.S. Rules Civ. Pro., Rule 66(c)(4). Under 16 A.R.S. Rules Civ. Pro., Rule 66(c)(2), the court may at any time suspend a receiver and may, upon notice, remove a receiver and appoint another. It can hardly be questioned that the state court maintains the authority to deny fees and expenses to a receiver it removes for committing fraud.

On the facts available to the Ninth Circuit, the shareholder's financial interest in the litigation is sufficiently placed at issue to defeat a motion for summary judgment brought on the grounds that they lack standing.

B. After Setting Aside The Entire State Court Judgment, The Shareholders Would Maintain The Same Standing They Enjoyed In The Original Receivership Proceedings.

The shareholders' standing in the original state court receivership proceedings is beyond question. As shareholders of a bank in receivership in state court, they maintained standing to raise objections to the receivership under 16 A.R.S. Rules Civ. Pro., Rule 66(c)(3) and by order of the state court. Even under

federal law, the shareholders are afforded the right to a full and complete accounting of the receivership. *See* 12 U.S.C. § 1821(d)(15)(A)(B)(C).

If the shareholders are successful in setting aside the state court judgment for fraud on the court, they would return to the state court with the same status they enjoyed in the original receivership proceedings. If the shareholders maintained standing in the prior proceedings in which a judgment was entered against them, they maintain standing to seek to set aside that judgment under Rule 60(b).

CONCLUSION

The shareholders respectfully request that this Court grant the Petition for Certiorari to review the issues raised herein.

Respectfully submitted,

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APPENDIX A — ORDER AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 26, 1995

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MORRIS HERRING, RAYMOND HERRING, JAMES N. CORBETT, LUIS VALENZUELA, ARMANDO ALFARO, and SHERMAN MONTGOMERY,
Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendant-Appellee.

No. 94-15779

D.C. No. CV-93-00127-EHC

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
November 14, 1995—San Francisco, California

Filed December 26, 1995
Amended April 19, 1996

Before: Herbert Y.C. Choy, Charles E. Wiggins, and Edward Leavy, Circuit Judges.

Opinion by Judge Choy

Appendix A

SUMMARY

Civil Litigation and Procedure/Judgments and Orders/ Standing

The court of appeals affirmed a district court judgment. The court held that parties who had no chance of recovering on their underlying claim lacked standing to assert an independent action to set aside the state court's judgment for fraud on the court.

After Southwestern Bank was placed in receivership, appellee the Federal Deposit Insurance Corp. (FDIC), as court-appointed receiver, petitioned the state court to enter an order approving payment of a final liquidating dividend, payment of interest on claims, sale of any newly discovered assets, disposal of the bank's books and records, and termination of the receivership. Appellants, Morris Herring and other Southwestern shareholders, filed objections. They complained of faulty accounting and insufficient information regarding an alleged $530,124 loss. The state court overruled the shareholders' objections, finding, among other things, that the funds would be insufficient to cover the FDIC's claim even if the $530,124 were disallowed. The court terminated the receivership. The state court of appeals affirmed, and the state supreme court denied a petition for review.

The shareholders filed in state court an independent action pursuant to Fed. R Civ. P 60(b) to set aside the judgment for fraud on the court. The FDIC removed the action to the federal district court. The shareholders alleged that the FDIC knowingly submitted false accounting figures, presented perjured testimony, submitted false final summary statements,

submitted documentation after the close of hearings, and submitted a false affidavit. The shareholders focused upon two specific losses the FDIC claimed on judgments against debtors. The district court granted summary judgment in favor of the FDIC. The shareholders appealed.

[1] Even if the $530,124 were disallowed, a resulting deficiency would still leave the shareholders nothing. [2] The FDIC was persuasive in arguing that the state courts established that even if the FDIC engaged in fraud, no correction could generate any funds for the shareholders. Thus, the shareholders had no chance of recovering on their underlying claim and no interest in the litigation.

[3] It was irrelevant whether or not the district court implicitly held that the shareholders had standing. [4] In addition, the shareholders were incorrect in arguing that Rule 60(b) expressly grants standing to parties to assert an independent action to set aside a judgment for fraud on the court. Rule 60(b) merely does not restrict any standing that a party otherwise has. Rule 60(b) did not grant the shareholders standing that they otherwise did not have. [5] A party with no interest in the litigation generally lacks standing. The shareholders could not recover funds even if their fraud allegations were true. Thus, they lacked standing to challenge that fraud.

[6] Where no one has an interest in the underlying litigation, no justiciable case or controversy exists. [7] In this case, setting aside the judgment would be a "fruitless gesture."

COUNSEL

Conrad Herring, San Diego, California, for the plaintiffs-appellants.

Appendix A

Lawrence G.D. Scarborough, Brown & Bain, Phoenix, Arizona, for the defendant-appellee.

ORDER

The opinion filed on December 26, 1995, 72 F.3d 762 (9th Cir. 1995), is amended, and the amended opinion is filed in its stead.

The amended opinion was circulated to all judges of this court on March 26, 1996. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

CHOY, Circuit Judge:

Appellants Morris Herring et al. ("the shareholders") appeal the summary judgment in favor of the Federal Deposit Insurance Corporation ("FDIC") in their independent action to set aside a state-court judgment for fraud on the court. We affirm.

I. Factual and Procedural Background

In September 1981, the Arizona Superintendent of Banks placed Southwestern Bank (Southwestern) in receivership. On

Appendix A

May 1, 1990, the FDIC as court-appointed receiver petitioned the Arizona Superior Court to enter an order approving payment of a final liquidating dividend, payment of interest on claims, sale of any newly discovered assets, disposal of Southwestern's books and records, and termination of the receivership.

Appellants, a group of Southwestern shareholders, filed objections. The shareholders complained of faulty accounting and insufficient information regarding an alleged $530,124 loss, and requested the court to order a more specific accounting or allow the shareholders leave to examine the receivership records.

After hearings and the filing of post-petition briefs, the Arizona Superior Court overruled the shareholders' objections. The court held that the disputed item of $530,124 consisted of losses sustained on the liquidation of assets and that the FDIC was not subject to surcharge for this amount. The court further held that the FDIC was entitled to interest on its own claim but that the receivership funds were insufficient to pay the interest. Moreover, the court found that the funds would be insufficient to cover the FDIC's claim even if the $530,124 were disallowed. Finally, the court held that the FDIC had not violated any fiduciary duties as receiver. On August 14, 1991, the court terminated the receivership.

On appeal, the Arizona Court of Appeals granted the FDIC's motion to strike portions of the shareholders' reply brief alleging "conspiracy, fraud, theft, misrepresentation and committing and suborning perjury" as issues newly raised on appeal. The Court of Appeals affirmed the trial court's decision, while deciding not to "address the volley of new and untimely claims raised in [the shareholders'] reply brief."

Appendix A

The shareholders petitioned for review before the Arizona Supreme Court on the grounds that the FDIC perpetrated a fraud on the court, and that the Court of Appeals erred by striking portions of their reply brief. The Arizona Supreme Court denied the petition for review.

The shareholders then filed in Arizona Superior Court this independent action pursuant to Rule 60(b) to set aside the judgment for fraud on the court, which the FDIC removed to federal district court. The shareholders alleged that the FDIC 1) knowingly submitted false accounting figures when it petitioned the court to terminate the receivership; 2) presented perjured testimony to the court concerning a bank receivership asset account labeled "other assets/judgments"; 3) submitted false final summary statements of the income and liquidation losses for the liquidated assets of Southwestern; 4) submitted documentation to justify the $530,124 loss after the close of the hearings and after the shareholders no longer had an opportunity to refute the FDIC's evidence; and 5) submitted a false affidavit by Kevin Ahart, an FDIC employee, regarding judgments written off during the receivership.

The shareholders focused upon two losses the FDIC claimed on judgments against debtors. First, the shareholders alleged that the FDIC received $83,784 in principal and interest from the successor-in-interest to a loan to a Mr. Harkins, while it claimed a $41,210.44 loss. Second, the shareholders asserted that a claimed $154,000 loss for a judgment against the League of United Latin American Citizens ("LULAC") had already been written off by Southwestern five years prior to the appointment of FDIC as receiver. The shareholders further alleged that the FDIC collected $40,000 in full satisfaction of the LULAC judgment yet fraudulently claimed that it collected nothing.

Appendix A

The FDIC moved for summary judgment. Following briefing and oral argument, the district court granted summary judgment on two grounds: first, that res judicata and collateral estoppel barred the shareholders' action, and second, that the FDIC committed no fraud on the court. The shareholders now appeal.

II. Analysis

Because the shareholders cannot recover funds on their underlying claim, they have no standing and we therefore affirm the district court's summary judgment against their fraud on the court claim. We may affirm on any basis the record supports, including one the district court did not reach. *USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276, 1279 (9th Cir. 1994).

A. The shareholders have no interest in the litigation.

[1] The shareholders' Supplemental Brief indicates that approximately $367,000 was available for distribution, while the FDIC and other creditors have interest claims of approximately $1,500,000. Thus even if the $530,124 were disallowed, the resulting $603,000 deficiency would still leave the shareholders nothing. The state trial court so found, noting that "there are not sufficient funds to pay the interest to which the FDIC is entitled, or even interest to 1985, even if this item [the disputed $530,124] were to be disallowed." Arizona Superior Court Minute Entry, June 28, 1991.

The shareholders respond that the fraud affects more than the $530,124. If the $530,124 were disallowed, the FDIC would accumulate less interest, and the trial court might also refuse to award the FDIC any interest or its receivership expenses of $883,282. If so, the shareholders might recover funds.

[2] The FDIC replies, and this court finds persuasive, that the Arizona courts have established that, even if the FDIC engaged in fraud, no correction could generate any funds for the shareholders. The Arizona courts have already calculated the interest due if the $530,124 were disallowed. Moreover, the shareholders point to nothing beyond a vague reference to "public policy" to indicate that the state court would have discretion to deny the FDIC the interest and expenses it was otherwise due. The shareholders have no chance of recovering on their underlying claim, and thus no interest in the litigation.

B. A party must have an interest in the litigation to raise a fraud on the court claim.

The FDIC argues that the shareholders must have some chance of recovering funds to have standing to assert a fraud on the court claim.The shareholders respond that (1) the district court granted them standing, (2) Rule 60(b) expressly grants parties standing to bring an independent action for fraud on the court, and alternatively (3) a court has inherent power sua sponte to investigate fraud on the court.

[3] The shareholders allege that, since the FDIC argued standing in its reply brief to the district court, the district court must have "granted" standing to plaintiffs before considering the merits of the summary judgment motion. It is irrelevant whether or not the district court implicitly held that the shareholders have standing; we review questions of standing de novo. *Barrus v. Sylvania*, 55 F.3d 468, 469 (9th Cir. 1995).

We have held that a nonparty's interests must be "directly affected" to raise a claim of fraud on the court. *See Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 778 (1995). The shareholders must explain why this requirement should not apply to parties as well.

[4] The shareholders argue that Rule 60(b) expressly grants standing to parties to assert an independent action to set aside a judgment for fraud on the court. We disagree. Rule 60(b) does not *grant* anyone standing to bring an independent action; it merely does not restrict any standing a party otherwise has. "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . ." Fed R. Civ. P. 60(b). Rule 60(b) does not grant the shareholders standing which they otherwise do not have.

[5] A party with no interest in the litigation generally has no standing. The shareholders cannot come to court just to hold the FDIC accountable for its alleged fraud; "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990) (quoting *Allen v. Wright*, 468 U.S. 737, 754 (1984)). The shareholders could not recover funds even if their fraud allegations were true; the shareholders thus lack standing to challenge that fraud.

[6] The shareholders argue alternatively that, even if they have no standing, the court has inherent power sua sponte to investigate fraud on the court, and treat the shareholders as friends of the court. *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946). In *Universal Oil*, however, there was a justiciable case or controversy, because non-parties had an interest in the preclusive effect of the prior litigation. Attorneys who represented interested non-parties to the prior litigation moved to set aside the judgment because evidence suggested bribery of the judge. The court accepted the services of these attorneys as *amici curiae*. *Id.* at 578. In contrast, here no one has a recognizable interest in the fraud claim; whether the FDIC committed fraud or not will only

affect the size of the FDIC's unpaid claim. A court's inherent power to inquire into the integrity of judgments "implies the prior existence of a justiciable case or controversy." *Root Refining Co. v. Universal Oil Prods. Co.*, 169 F.2d 514, 521-22 (3d Cir. 1948), *cert. denied*, 335 U.S. 912 (1949). If no one has an interest in the underlying litigation, no justiciable case or controversy exists.

[7] In *Alexander v. Robertson*, this court rejected a possible fraud on the court claim, in part because the plaintiff had no chance of recovering on the underlying claim. 882 F.2d 421, 425 (9th Cir. 1989). "Robertson cannot succeed on his cross-claims against Fraser and Protective. In essence, then, setting aside the judgment would be a 'fruitless' gesture that would hardly bolster the public's perception of the judicial process." *Id.* The reasoning in *Alexander* buttresses this court's conclusion that the shareholders cannot assert a fraud on the court claim because they have no interest in the litigation; setting aside the judgment would indeed be a "fruitless gesture."

Because we find the shareholders lack standing, we do not reach the other issues raised in this appeal.

The judgment of the district court is AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 26, 1995

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MORRIS HERRING; RAYMOND HERRING; JAMES N. CORBETT; LUIS VALENZUELA; ARMANDO ALFARO, and SHERMAN MONTGOMERY,
Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendant-Appellee.

No. 94-15779
D.C. No. CV-93-00127-EHC
OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
November 14, 1995—San Francisco, California

Filed December 26, 1995

Before: Herbert Y.C. Choy, Charles E. Wiggins, and Edward Leavy, Circuit Judges.

Opinion by Judge Choy

Appendix B

SUMMARY

Civil Litigation and Procedure/Judgments and Orders/ Standing

The court of appeals affirmed a district court judgment. The court held that parties who had no chance of recovering on their underlying claim lacked standing to assert an independent action to set aside the state court's judgment for fraud on the court.

After Southwestern Bank was placed in receivership, appellee the Federal Deposit Insurance Corp. (FDIC), as court-appointed receiver, petitioned the state court to enter an order approving payment of a final liquidating dividend, payment of interest on claims, sale of any newly discovered assets, disposal of the bank's books and records, and termination of the receivership. Appellants, Morris Herring and other Southwestern shareholders, filed objections. They complained of faulty accounting and insufficient information regarding an alleged $530,124 loss. The state court overruled the shareholders' objections, finding, among other things, that the funds would be insufficient to cover the FDIC's claim even if the $530,124 were disallowed. The court terminated the receivership. The state court of appeals affirmed, and the state supreme court denied a petition for review.

The shareholders filed in state court an independent action pursuant to Fed. R Civ. P 60(b) to set aside the judgment for fraud on the court. The FDIC removed the action to the federal district court. The shareholders alleged that the FDIC knowingly submitted false accounting figures, presented perjured testimony, submitted false final summary statements,

submitted documentation after the close of hearings, and submitted a false affidavit. The shareholders focused upon two specific losses the FDIC claimed on judgments against debtors. The district court granted summary judgment in favor of the FDIC. The shareholders appealed.

[1] Even if the $530,124 were disallowed, a resulting deficiency would still leave the shareholders nothing. [2] The FDIC was persuasive in arguing that the state courts established that even if the FDIC engaged in fraud, no correction could generate any funds for the shareholders. Thus, the shareholders had no chance of recovering on their underlying claim and no interest in the litigation.

[3] It was irrelevant whether or not the district court implicitly held that the shareholders had standing. [4] And, the shareholders were incorrect in arguing that Rule 60(b) expressly grants standing to parties to assert an independent action to set aside a judgment for fraud on the court. Rule 60(b) merely does not restrict any standing that a party otherwise has. Rule 60(b) did not grant the shareholders standing which they otherwise did not have. [5] A party with no interest in the litigation generally lacks standing. The shareholders could not recover funds even if their fraud allegations were true. Thus, they lacked standing to challenge that fraud.

[6] Where no one has an interest in the underlying litigation, no justiciable case or controversy exists. [7] Although a court may have inherent power to investigate fraud perpetrated on itself, a court should not sua sponte investigate fraud on another court when no interested party or nonparty has requested investigation. [8] In this case, setting aside the judgment would be a "fruitless gesture."

COUNSEL

Conrad Herring, San Diego, California, for the plaintiffs-appellants.

Lawrence G.D. Scarborough, Brown & Bain, Phoenix, Arizona, for the defendant-appellee.

OPINION

CHOY, Circuit Judge:

Appellants Morris Herring et al. ("the shareholders") appeal the summary judgment in favor of the Federal Deposit Insurance Corporation ("FDIC") in their independent action to set aside a state-court judgment for fraud on the court. We affirm.

I. Factual and Procedural Background

In September 1981, the Arizona Superintendent of Banks placed Southwestern Bank ("Southwestern") in receivership. On May 1, 1990, the FDIC as court-appointed receiver petitioned the Arizona Superior Court to enter an order approving payment of a final liquidating dividend, payment of interest on claims, sale of any newly discovered assets, disposal of Southwestern's books and records, and termination of the receivership.

Appellants, a group of Southwestern shareholders, filed objections. The shareholders complained of faulty accounting and insufficient information regarding an alleged $530,124 loss, and requested the court to order a more specific accounting or allow the shareholders leave to examine the receivership records.

Appendix B

After hearings and the filing of post-petition briefs, the Arizona Superior Court overruled the shareholders' objections. The court held that the disputed item of $530,124 consisted of losses sustained on the liquidation of assets and that the FDIC was not subject to surcharge for this amount. The court further held that the FDIC was entitled to interest on its own claim but that the receivership funds were insufficient to pay the interest. Moreover, the court found that the funds would be insufficient to cover the FDIC's claim even if the $530,124 were disallowed. Finally, the court held that the FDIC had not violated any fiduciary duties as receiver. On August 14, 1991, the court terminated the receivership.

On appeal, the Arizona Court of Appeals granted the FDIC's motion to strike portions of the shareholders' reply brief alleging "conspiracy, fraud, theft, misrepresentation and committing and suborning perjury" as issues newly raised on appeal. The Court of Appeals affirmed the trial court's decision, while deciding not to "address the volley of new and untimely claims raised in [the shareholders'] reply brief."

The shareholders petitioned for review before the Arizona Supreme Court on the grounds that the FDIC perpetrated a fraud on the court, and that the Court of Appeals erred by striking portions of their reply brief. The Arizona Supreme Court denied the petition for review.

The shareholders then filed in Arizona Superior Court this independent action pursuant to Rule 60(b) to set aside the judgment for fraud on the court, which the FDIC removed to federal district court. The shareholders alleged that the FDIC 1) knowingly submitted false accounting figures when it petitioned the court to terminate the receivership; 2) presented perjured testimony to the court concerning a bank receivership asset account labeled "other assets/judgments"; 3) sub-

mitted false final summary statements of the income and liquidation losses for the liquidated assets of Southwestern; 4) submitted documentation to justify the $530,124 loss after the close of the hearings and after the shareholders no longer had an opportunity to refute the FDIC's evidence; and 5) submitted a false affidavit by Kevin Ahart, an FDIC employee, regarding judgments written off during the receivership.

The shareholders focused upon two losses the FDIC claimed on judgments against debtors. First, the shareholders alleged that the FDIC received $83,784 in principal and interest from the successor-in-interest to a loan to a Mr. Harkins, while it claimed a $41,210.44 loss. Second, the shareholders asserted that a claimed $154,000 loss for a judgment against the League of United Latin American Citizens ("LULAC") had already been written off by Southwestern five years prior to the appointment of FDIC as receiver. The shareholders further alleged that the FDIC collected $40,000 in full satisfaction of the LULAC judgment yet fraudulently claimed that it collected nothing.

The FDIC moved for summary judgment. Following briefing and oral argument, the district court granted summary judgment on two grounds: first, that res judicata and collateral estoppel barred the shareholders' action, and second, that the FDIC committed no fraud on the court. The shareholders now appeal.

II. Analysis

Because the shareholders cannot recover funds on their underlying claim, they have no standing and we therefore affirm the district court's summary judgment against their fraud on the court claim. We may affirm on any basis the

record supports, including one the district court did not reach. *USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276, 1279 (9th Cir. 1994).

A. The shareholders have no interest in the litigation.

[1] The shareholders' Supplemental Brief indicates that approximately $367,000 was available for distribution, while the FDIC and other creditors have interest claims of approximately $1,500,000. Thus even if the $530,124 were disallowed, the resulting $603,000 deficiency would still leave the shareholders nothing. The state trial court so found, noting that "there are not sufficient funds to pay the interest to which the FDIC is entitled, or even interest to 1985, even if this item [the disputed $530,124] were to be disallowed." Arizona Superior Court Minute Entry, June 28, 1991.

The shareholders respond that the fraud affects more than the $530,124. If the $530,124 were disallowed, the FDIC would accumulate less interest, and the trial court might also refuse to award the FDIC any interest or its receivership expenses of $883,282. If so, the shareholders might recover funds.

[2] The FDIC replies, and this court finds persuasive, that the Arizona courts have established that, even if the FDIC engaged in fraud, no correction could generate any funds for the shareholders. The Arizona courts have already calculated the interest due if the $530,124 were disallowed. Moreover, the shareholders point to nothing beyond a vague reference to "public policy" to indicate that the state court would have discretion to deny the FDIC the interest and expenses it was otherwise due. The shareholders have no chance of recovering on their underlying claim, and thus no interest in the litigation.

B. A party must have an interest in the litigation to raise a fraud on the court claim.

The FDIC argues that the shareholders must have some chance of recovering funds to have standing to assert a fraud on the court claim.The shareholders respond that (1) the district court granted them standing, (2) Rule 60(b) expressly grants parties standing to bring an independent action for fraud on the court, and alternatively (3) a court has inherent power sua sponte to investigate fraud on the court.

[3] The shareholders allege that, since the FDIC argued standing in its reply brief to the district court, the district court must have "granted" standing to plaintiffs before considering the merits of the summary judgment motion. It is irrelevant whether or not the district court implicitly held that the shareholders have standing; we review questions of standing de novo. *Barrus v. Sylvania*, 55 F.3d 468, 469 (9th Cir. 1995).

We have held that a nonparty's interests must be "directly affected" to raise a claim of fraud on the court. *See Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 778 (1995). The shareholders must explain why this requirement should not apply to parties as well.

[4] The shareholders argue that Rule 60(b) expressly grants standing to parties to assert an independent action to set aside a judgment for fraud on the court. We disagree. Rule 60(b) does not *grant* anyone standing to bring an independent action; it merely does not restrict any standing a party otherwise has. "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . ." Fed R. Civ. P. 60(b). Rule

60(b) does not grant the shareholders standing which they otherwise do not have.

[5] A party with no interest in the litigation generally has no standing. The shareholders cannot come to court just to hold the FDIC accountable for its alleged fraud; "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990) (quoting *Allen v. Wright*, 468 U.S. 737, 754 (1984)). The shareholders could not recover funds even if their fraud allegations were true; the shareholders thus lack standing to challenge that fraud.

[6] The shareholders argue alternatively that, even if they have no standing, the court has inherent power sua sponte to investigate fraud on the court, and treat the shareholders as friends of the court. *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946). The present case differs from *Universal Oil* in two ways. First, in *Universal Oil* there was a justiciable case or controversy, because non-parties had an interest in the preclusive effect of the prior litigation. Attorneys who represented interested non-parties to the prior litigation moved to set aside the judgment because evidence suggested bribery of the judge. The court accepted the services of these attorneys as *amici curiae*. *Id.* at 578. In contrast, here no one has a recognizable interest in the fraud claim; whether the FDIC committed fraud or not will only affect the size of the FDIC's unpaid claim. A court's inherent power to inquire into the integrity of judgments "implies the prior existence of a justiciable case or controversy." *Root Refining Co. v. Universal Oil Prods. Co.*, 169 F.2d 514, 521-22 (3d Cir. 1948), *cert. denied*, 335 U.S. 912 (1949). If no one has an interest in the underlying litigation, no justiciable case or controversy exists.

[7] Second, in *Universal Oil* the court which sua sponte investigated the fraud was the same court which had suffered the fraud. *Universal Oil Prod. Co. v. Root Refining Co.*, 328 U.S. 575 (1946). In contrast, the shareholders here ask a federal court sua sponte to investigate fraud on a state court. Perhaps a court has inherent power to investigate fraud perpetrated on itself, but a court should not sua sponte investigate fraud on another court when no interested party or nonparty has requested the investigation.

[8] In *Alexander v. Robertson*, this court rejected a possible fraud on the court claim, in part because the plaintiff had no chance of recovering on the underlying claim. 882 F.2d 421, 425 (9th Cir. 1989). "Robertson cannot succeed on his cross-claims against Fraser and Protective. In essence, then, setting aside the judgment would be a 'fruitless' gesture that would hardly bolster the public's perception of the judicial process." *Id.* The reasoning in *Alexander* buttresses this court's conclusion that the shareholders cannot assert a fraud on the court claim because they have no interest in the litigation; setting aside the judgment would indeed be a "fruitless gesture."

Because we find the shareholders lack standing, we do not reach the other issues raised in this appeal.

The judgment of the district court is AFFIRMED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FILED APRIL 20, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 93 - 0127 TUC EHC

MORRIS HERRING, et al.,

Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

Introduction

On February 10, 1993, plaintiffs filed a complaint in Pima County Superior Court against defendant Federal Deposit Insurance Corporation (FDIC) as former receiver of Southwestern Bank (Southwestern). The complaint seeks relief from a judgment in Pima County Superior Court, cause number CV 197195-A, granting the FDIC's petition for an order disbursing the remaining assets of Southwestern and terminating the receivership. Plaintiffs, who allege to be shareholders of the now defunct Southwestern, claim to be entitled to relief by virtue of fraud upon the court. Arizona Rule of Civil Procedure 60(c).

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On March 3, 1993, defendant filed a notice of removal pursuant to 12 U.S.C. § 1819(b)(2) and the case was removed to federal court, Tucson division, in conformity with 28 U.S.C. § 1442(a)(1). Defendant then moved for dismissal of the action on the ground that plaintiffs failed to request the permission of the appellate court to proceed pursuant to Ariz. R. Civ. P. 60(c).[1] The Court denied defendant's motion, holding that Federal Rule of Civil Procedure 60(b), as opposed to the state rule, applied to this case and that under the federal rule plaintiffs were not required to seek the permission of the appellate court to pursue this independent cause of action. Defendant's answer was filed May 13, 1993.

Defendant has moved for dismissal or for summary judgment, and for a limited protective order relating to discovery requests. These motions are fully briefed and have been argued before the Court.

Procedural Background

In September 1981, the Arizona Superintendent of Banks placed Southwestern in receivership and applied to the Pima County Superior Court for the appointment of the FDIC as receiver, *Madsen v. Southwestern Bank*, CV 197195-A. On May

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1. Defendant's motion to dismiss relied on *Rogers v. Ogg*, 416 P.2d 594 (Ariz. 1966), a case in which the Arizona Supreme Court adopted the court-created requirement of receiving permission from an appellate court to proceed in a separate action under Rule 60. *See* Order dated March 29, 1993 at 1.

With the exception of a time limitation not applicable to the present case, Arizona Rule 60(c) and Federal Rule 60(b) are identical.

1, 1990, the FDIC petitioned the Superior Court to enter an order approving payment of a final liquidating dividend, payment of interest on claims, sale of any newly discovered assets, disposal of Southwestern's books and records, and termination of the receivership. Plaintiffs' State Court Hearing Exhibits, Volume 1 at Exhibit 1.[2]

Plaintiffs in the instant action filed objections in Superior Court concerning the FDIC's petition. *Id.* at Exhibit 2.[3] Plaintiffs complained of the lack of information supplied by the receiver with regard to its financial activities. Plaintiffs also complained of specific accounting practices in the accountings provided by the FDIC. *Id.* at 3-5. Plaintiffs requested the court to order a more specific accounting or allow plaintiffs leave to examine the receivership records.

A liquidation hearing was held on July 23, 1990. After the hearing, the trial court issued a minute entry approving the final dividend payment and continued the hearing on all other issues. The court ordered plaintiffs to file any further objections with respect to the receiver's petition by November 5, 1990. Following two hearings and the filing of post-hearing briefs, the court overruled plaintiffs' objections to the petition. Minute

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2. On August 22, 1984, the court approved a first liquidating dividend of $2.89 million, approximately 76% of the total proven claims. In June 1986, the court approved a second dividend of $801,943, approximately 21% of the total proven claims. Thus, the petition for final liquidation involved the remaining 3% of the total proven claims. *See* Arizona Court of Appeals Memorandum Decision, FDIC's Statement of Facts, Exhibit 1 at 3.

3. Plaintiffs had previously filed a petition for an accounting by the receiver in September 1986. The court denied plaintiffs' petition on March 18, 1988.

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Entry of June 28, 1991, FDIC's Reply Exhibit G. The court held that the FDIC was entitled to be paid interest on its claim and that there were insufficient funds available to pay the interest. The court further held that the disputed item of $530,124 consisted of losses sustained on the liquidation of assets and that the receiver was not subject to surcharge for this amount.[4] Moreover, the court found that there would not be sufficient funds to which the FDIC was entitled even if the item were disallowed. Finally, the court held that there had been no showing that the FDIC violated any fiduciary duties as receiver.

On August 14, 1991, the court entered an order terminating the receivership.

Plaintiffs appealed the judgment to the Arizona Court of Appeals. In their opening brief on appeal, plaintiffs raised the following issues:

> (1) whether the FDIC as receiver of the bank rendered a sufficient accounting of its receivership activities;
>
> (2) whether the FDIC as receiver met its fiduciary obligations to the shareholders of the bank; and
>
> (3) whether the trial court erred in its final judgment ordering the termination of the receivership and approving the final

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4. As will be more fully developed, *infra*, plaintiffs' principal objection to the FDIC's accounting concerns a claimed liquidating loss of $530,124 from an asset account labeled "other assets/judgment"

> liquidating dividend, payment of interest on claims, and the sale of any newly-discovered assets.

Memorandum Decision at 5-6 (FDIC's Statement of Facts at Exhibit A).

After the parties had filed their respective appellate briefs, the FDIC moved to strike portions of plaintiffs/appellants' reply brief on the ground that it discussed issues raised for the first time on appeal:

> The reply brief here consistently raises such new issues, including that FDIC and its counsel participated in tortious and criminal misconduct involving conspiracy, fraud, theft, misrepresentation and committing and suborning perjury ... Each of these unsupported allegations is newly raised in the reply brief and should be struck.

Motion to Strike Portions of Appellants' Reply Brief, Plaintiffs' Statement of Facts at Exhibit 4. The Court of Appeals granted the motion to strike without comment. Plaintiffs' Statement of Facts at Exhibit 5.

In a memorandum decision filed July 23, 1992, the Court of Appeals affirmed the judgment of the Superior Court. FDIC's Statement of Facts at Exhibit 1. The court found that the trial court's decision to reject appellants, objections was supported by the evidence and was not demonstrated to be clearly erroneous. *Id.* at 9. The court also found support in the record for the trial court's rejection of appellants' breach of fiduciary duty

claim. *Id.* at 13-14. Finally, the court concluded not to "address the volley of new and untimely claims raised in [appellants'] reply brief." *Id.* at 14.

Before the Arizona Supreme Court, plaintiffs argued that their petition for review should be granted because the FDIC perpetrated a fraud on the court, undermining any credibility in its unsupported summary accounting figures regarding the disposition of Southwestern's assets. Plaintiffs further argued that the Court of Appeals erred as a matter of law by striking portions of their reply brief. Appellants' Petition for Review, FDIC's Exhibit S. The Arizona Supreme Court denied plaintiffs' petition for review in an order dated July 23, 1992.

Complaint

In the instant action, plaintiffs allege that the FDIC, in order to induce the court to grant the proposed termination order, submitted knowingly false accounting figures to the court at the time they petitioned the court to terminate their receivership. Complaint at para. 8-10. Plaintiffs further allege that the court relied on the falsified accounting figures in granting the FDIC's proposed receivership termination order. *Id.* at para. 12.

Plaintiffs also assert that the FDIC presented perjured testimony to the court concerning a bank receivership asset account labeled "other assets/judgments." *Id.* at para. 13. More specifically, plaintiffs allege that an FDIC employee, "Stacy Hayashi falsely testified that the receiver legitimately lost over $530,124 from the 'other assets/judgments' account" as a result of "uncollectable judgments sought and obtained by the FDIC during the receivership on uncollectable loans that were part of the assets of the receivership." *Id.* at para. 13-14. Plaintiffs also

allege that the FDIC submitted false final summary statements of the income and liquidation losses for the liquidated assets of Southwestern.

Plaintiffs contend that the FDIC submitted documentation purporting to justify the $530,124 loss after the close of the hearings and after plaintiffs no longer had an opportunity to refute the FDIC's evidence. *Id.* at paras. 16-17. Plaintiffs also allege that the affidavit submitted by Kevin Ahart, an FDIC employee, with regard to judgments written off during the receivership is false. *Id.* at para. 18.

The complaint refers to two specific losses claimed by the FDIC on judgments against debtors. First, plaintiffs allege that FDIC claimed $41,210.44 loss on a judgment against Harkins, but that it I did not obtain such a judgment because it received $83,784 in principal and interest on the debt from the successor in interest to the Harkins loan. *Id.* at 20. Second, plaintiffs assert that a claimed $154,000 loss for a judgment against L.U.L.A.C. had already been written off by Southwestern five years prior to the appointment of FDIC as receiver. *Id.* at para. 21. With regard to the L.U.L.A.C. judgment, plaintiffs further allege that the FDIC collected $40,000 in full satisfaction of the judgment yet fraudulently claimed that it collected nothing on the judgment. *Id.* at para. 22.

Plaintiffs' two-count complaint requests: (I) relief from the judgment obtained by fraud; and (II) to set aside judgment for fraud upon the court.

FDIC's Motion to Dismiss or For Summary Judgment

While defendant's motion cites numerous grounds on which

defendant is allegedly entitled to relief, defendant's arguments are generally divisible into two principal arguments. First, defendant argues that the record establishes that there were no misrepresentations with regard to the LULAC or Harkins/ Wachter loans. Second, defendant argues that plaintiffs are foreclosed from relitigating their claims by res judicata, collateral estoppel or, more generally, because plaintiffs failed to pursue the claims during the prior state court proceedings.

With regard to the first argument, that the uncontroverted record establishes that there were no misrepresentations as to the LULAC or Harkins loans, the FDIC sets forth facts purporting to explain the losses relating to these loans. In response, plaintiffs do not dispute defendant's accounting of the losses relating to the two loans. Rather, plaintiffs contend that defendant does not address all the allegations made concerning the LULAC and Harkins loans. Plaintiffs also argue that their complaint is not limited to the two loans on which defendant's motion is based.

Res Judicata and Collateral Estoppel

The FDIC's second argument in support of dismissal or summary judgment asserts that plaintiffs are barred from bringing this action by res judicata, collateral estoppel, and because plaintiffs failed to pursue the claims during the first action.

Res judicata applies when (i) there has been a final judgment on the merits in a prior suit and (ii) the parties, the subject matter and the cause of action are the same. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979). In the instant action, plaintiffs allege that the FDIC committed acts of fraud and perjury, misrepresented its accounting figures to the state court,

falsified losses to the receivership of Southwestern, and committed fraud upon the state court. The FDIC argues that these allegations were essentially raised in the prior action.

The FDIC also argues that plaintiffs are collaterally estopped from asserting that the receivership did not sustain the alleged losses because the issue of the truth or falsity of the FDIC's record of the losses could have been raised and/or resolved in the prior action. Again, plaintiffs respond that the issues of fraud, perjury and misrepresentation were neither raised nor decided in the state court action. [5]

"Courts have consistently held that a party is precluded by res judicata from relitigation in the independent equitable action issues that were open to litigation in the former action where he had a fair opportunity to make his claim or defense in that action." *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 79 (5th Cir. 1970), *cert. denied* 399 U.S. 927 (1970). In *Bullooch v. United States*, 763 F.2d 1115 (10th Cir. 1985), *cert. denied* 106

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5. *But see* Official Transcript of hearing before Superior Court dated November 27, 1990, Plaintiffs' Statement of Facts at Exhibit 3.

> . . . And, Your Honor, I'm not going to argue to the Court for a moment that any of these people are crooks or that there has been fraud or embezzlement or anything anywhere near it. My argument is that, notwithstanding the scope and majesty of the Federal Deposit Insurance Corporation, and all of the problems that exist in this country right now with banking institutions, they still have a duty to the shareholders.

Statement of plaintiffs' counsel.

S.Ct. 862, the Court of Appeals held that the district court abused its discretion in setting aside, on ground of frauds, a judgment entered against plaintiffs where all information, data and witnesses available in independent action to set aside judgment were available at the time of the original trial and plaintiffs failed to establish withholding of data, records and letters.

The record reflects that on numerous occasions plaintiffs raised issues about the accuracy of the FDIC's documentation of the $530,124 loss. After the initial liquidation hearing was held on July 23, 1990, the court ordered that any further objections with respect to the FDIC's petition be made in writing and filed with the Clerk no later than November 5, 1990. Minute Entry of July 26, 1990 (FDIC's Reply at Exhibit A). The FDIC has also submitted evidence that it offered on several occasions before the bar date to make available to plaintiffs records relating to the receivership, although the only discovery plaintiffs conducted was two allegedly short depositions; no documents were requested. At the November 27, 1990 hearing, plaintiffs stipulated that they had not requested any documentation relative to their objections. Defendant's Reply Exhibits at F.

After the parties exchanged post-hearing memoranda, plaintiffs moved the state trial court to re-open the case to permit them to address many of the same allegations raised in the instant complaint. Petitioners' Request for Conference with the Court, FDIC's Statement of Facts at Exhibit P. For example, plaintiffs claimed that many of the loans were repaid by the borrowers prior to the initiation of the receivership. *Id.* The court denied plaintiffs' request to re-open the case and plaintiffs did not appeal that decision.

Plaintiffs acknowledge that during the state trial they

contested the accuracy of defendant's accounting of the receivership and specifically argued that the $530, 124 alleged loss on judgments was not legitimate. However, plaintiffs assert that they did not allege fraud or any intentional misconduct.

In response to the FDIC's argument that plaintiffs had a fair opportunity to present their claims in the state court proceeding, plaintiffs argue that at no time during the state trial proceeding did they believe or have reason to suspect that defendant was intentionally attempting to deceive or defraud the state court. Plaintiffs argue that because the FDIC is an agency of the federal government, and given the FDIC's position as trustee, fiduciary and officer of the court, plaintiffs were not obliged to investigate whether defendant was committing intentional acts of misconduct, without a substantial basis for believing that such intentional misconduct was committed. Plaintiffs do not refer to any authority in support of this argument.[6] Nor do plaintiffs refer to any information or documentation not available to them during the prior state court proceeding.

Attached to their opposition to the FDIC's motion to dismiss or for summary judgment, plaintiffs submit an affidavit of William Gormley, a former FDIC examiner and, since 1984, a banking consultant. In his lengthy (ten-page) affidavit, Gormley raises numerous contentions as to the FDIC's "questionable accounting" treatment of the $530,123 loss, and whether there was such a loss. Gormley Affidavit at ¶ 36. Gormley admits that any one of the numerous problem areas in the receivership

6. Plaintiffs conclude this rather unique argument as follows: Defendant does not point to any piece of evidence that was known or should have been known to the Plaintiffs during the state trial that would have placed a duty upon Plaintiffs to investigate whether Defendant was committing a fraud or other intentional misconduct. Response at 12.

accounting "may be nothing more than the result of mistakes and incompetence." *Id.* at ¶ 43. However, Gormley argues that the alleged problems with the accounting methods for the other assets/judgments account, losses reportedly sustained in that account, and the FDIC's inconsistent and irreconcilable explanations for the losses "bear a non-coincidental relationship to each other." *Id.*

> It is my conclusion that the FDIC cannot legitimately explain its reported $530,123 loss to the receivership. Based on the documentation that I have review thus far, the shareholders of Southwestern Bank are justified in contending that the FDIC has engaged in improper conduct. However, it is not necessary to draw conclusions based upon the documents provided by the FDIC thus far. The FDIC has in its possession certain documentation, which, if provided, would resolve all doubts in this matter. A review of this documentation can and will establish exactly what transpired during the receivership of Southwestern Bank.

Id. at ¶ 44. Gormley proceeds to identify the documentation necessary to "establish exactly what transpired during the receivership." *Id.*

Gormley's affidavit is based exclusively on documents appearing in the state court record. Notably, Gormley does not refer to any specific evidence of fraudulent conduct on the part of the FDIC. Rather, Gormley's criticism is nebulous and imprecise: "these losses bear a non-coincidental relationship;"

"FDIC has engaged in improper conduct;" "confusing, inconsistent, and irreconcilable explanations."

Rule 60(b) provides that a court may consider an independent action to set aside a judgment in cases of fraud. Numerous cases have held that a Rule 60(b) action may be maintained only in cases of alleged extrinsic fraud, as opposed to intrinsic fraud. *See e.g. Wood v. McEwen*, 644 F.2d 797 (9th Cir. 1981). However, in *In Re Intermagnetics America Inc.*, 926 F.2d 912 (9th Cir. 1991), the Ninth Circuit held that the intrinsic/extrinsic distinction generally does not apply to fraud upon the court. Rather, the inquiry as to whether a judgment should be set aside for fraud upon the court under Rule 60(b) focuses on whether the alleged fraud harms the integrity of the judicial process. *Id.* at 917.

> 'Fraud upon the court' should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.

Id. at 916, quoting 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 60.33, at 515 (2d ed. 1978).

In opposition to defendant's motion for summary judgment, plaintiffs rely principally on two cases: *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 64 S.Ct. 997 (1944) *overruled on other grounds, Standard Oil of Cal. v. United States*, 97 S.Ct. 31 (1976); and *Toscano v. CIR*, 441 F.2d 930 (9th Cir. 1971).

Appendix C

In *Hazel-Atlas*, the Supreme Court granted Rule 60(b) relief to a plaintiff nine years after the termination of the initial lawsuit. 64 S.Ct. 997, 1004. The relevant facts are as follows: In order to succeed on a patent application that was confronted with apparently "insurmountable Patent Office opposition," attorneys and officials for Hartford prepared an article extolling the virtues of their "revolutionary device." *Id.* at 998-999. Hartford then succeeded in procuring a well-known and ostensibly disinterested expert to sign the article for publication. *Id.* Following its publication, Hartford submitted the article in support of its patent application, which was subsequently granted. *Id.* at 999.

In 1928, Hartford brought suit against Hazel-Atlas to enforce I the patent. *Id.* at 999. The article was introduced in the record. *Id.* The District Court dismissed the action, finding no infringement. *Id.* In their brief on appeal, the attorneys for Hartford, one of whom had played a part in getting the article published, directed the Court of Appeals to the article. *Id.* In a decision holding the patent valid and infringed and reversing the District Court, the Court of Appeals "quot[ed] copiously" from the article. *Id.*

At the time of the trial in District Court, "where the article, seemingly played no important part," attorneys for Hazel-Atlas first heard stories of the articles true authorship, but did not attempt to confirm the hearsay stories. *Id.* After the opinion of the Circuit Court was issued, in 1932, Hazel-Atlas hired investigators for purposes of confirming the story with admissible evidence. *Id.*

Admissible proof regarding the authorship of the article was for the first time brought to light in 1941. *Id.* at 1000. Hazel-Atlas then filed its Rule 60(b) action.

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The Circuit Court denied relief and, on *certiorari*, the Supreme Court reversed, vacating the 1932 judgment of the Circuit Court and reinstating the original judgment of the District Court:

> Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. Proof of the scheme, and of its complete success up to date, is conclusive.

Id. at 1001 (citations omitted).

The Court also held that Hazel-Atlas was not barred by lack of diligence in bringing the action:

> . . . We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit . . .

Id. at 1001.

Appendix C

In *Toscano v. C.I.R.*, plaintiff challenged the Commissioner's attempt to collect deficiencies which were admitted to by her purported spouse Toscano, then deceased. 441 F.2d at 931. Plaintiff submitted evidence that she was never married to Toscano, contrary to representations made by Toscano. *Id.* Plaintiff never received a copy of the notice of deficiency, never signed the joint petition for review, and did not authorize the estranged Toscano or his attorney to appear for her or enter the stipulated admission to certain deficiencies. *Id.*

"Fraud on the court must involve 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.' " *Abatti v. C.I.R.*, 859 F.2d 115, 118 (9th Cir. 1988) (quoting *Toscano*, 441 F.2d at 934). Unlike the plaintiffs in *Hazel-Atlas* and *Toscano*, plaintiffs in the instant case have presented no evidence demonstrating any fraud relating to the state court decision. Plaintiffs' expert witness does not even support plaintiffs' serious allegations of fraud and perjury. Rather, he contends that it is "not necessary to draw conclusions based upon the documents provided by the FDIC thus far. The FDIC has in its possession certain documentation, which, if provided, would resolve all doubts in this matter." Gormley Affidavit at ¶ 44. However, plaintiffs do not allege that the FDIC refused to produce these documents during the state court proceedings.

Throughout the state court proceedings, plaintiffs argued that the FDIC failed to provide an adequate accounting of its receivership activities. With regard to the $530,124 loss, plaintiffs argued in their closing memorandum in Superior Court that, "[c]learly, the FDIC has attempted to turn nothing (charged off loans never appearing as assets) into something (a $530,124 loss)." The state trial court considered and rejected plaintiffs'

arguments and its decision was affirmed. In reality, plaintiffs now seek to relitigate issues already addressed by the state court: before the state court, plaintiffs argued that the accounting was inadequate and incorrect; here, plaintiffs argue that the accounting was inadequate and fraudulently incorrect.

"Fraud upon the court confers equitable jurisdiction on a court to set aside a judgment where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent . . . " *Luttrell v. United States*, 644 F.2d 1274, 1276 (9th Cir. 1980); *accord Bulloch v. United States*, 763 F.2d at 1121. In *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 870 (9th Cir. 1976), under very different circumstances, the court declined to remand a case on the grounds that the basis of the Rule 60(b) motion should have been known to movant at the time of the original proceeding. Here, there is nothing in the record to indicate that plaintiffs were deprived of the opportunity, through fraud or otherwise, from completely developing and litigating their case. This is particularly relevant in light of plaintiffs, failure to conduct any significant amount of discovery in support of their objections to the $530,124 loss before the cut-off date ordered by the state court.

ACCORDINGLY,

IT IS ORDERED granting defendant's motion for summary judgment (dkt. 25).[7]

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7. Because of the Court's decision of defendant's motion for summary judgment, the Court need not address defendant's motion to dismiss or motion for limited protective order.

Appendix C

IT IS FURTHER ORDERED that the Clerk of the Court enter judgment in favor of defendant and that plaintiffs take nothing by virtue of this action.

DATED this 18th day of April, 1994.

s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FILED APRIL 29, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 93-127 TUC ACM

MORRIS HERRING, et al.,

Plaintiffs,

vs.

THE FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant.

ORDER

I. OVERVIEW:

Pending before the Court is a Motion to Dismiss by the Defendant ("FDIC"). The FDIC removed this case to federal court and now moves to dismiss contending that the federal court lacks subject matter jurisdiction. The Court conducted a hearing on April 26, 1993.

II. DISCUSSION:

The FDIC states that, although this Court has jurisdiction pursuant to 12 U.S.C. § 1819(b)(2), the Plaintiffs failed to request permission to proceed on this action pursuant to Rule 60(c), Arizona Rules of Civil Procedure ("Arizona Rule 60").

Because the Plaintiffs failed to do so, the FDIC contends, the Plaintiffs are barred from bringing this action. *See Rogers v. Ogg*, 416 P.2d 594 (Az. S. Ct. 1966). The Plaintiffs counter that, since this case is now in federal court, the Federal Rules of Civil Procedure apply pursuant to the *Erie* doctrine. *See Hanna v. Plumer*, 85 S. Ct. 1136 (1965); *see also, Erie R. Co. v. Tompkins*, 58 S. Ct. 817 (1938). Under Rule 60(b), Fed. R. Civ. P. ("Federal Rule 60"), there is no requirement for seeking permission from an appellate court before proceeding under Federal Rule 60. *See Standard Oil Co. of California v. United States*, 97 S. Ct. 31 (1976). Therefore, the Plaintiffs argue, there is no requirement to seek permission from the appellate court.

The Court finds that this case is unique in several ways. Normally, the *Erie* doctrine applies only when the subject matter jurisdiction is under diversity of citizenship. Technically, this Court has jurisdiction pursuant to a federal statute, 12 U.S.C. § 1819(b)(2). Nevertheless, this Court may be required to apply the state substantive law. Therefore, the *Erie* doctrine applies in this case.

This Court can find no difference in the language of Federal Rule 60(b) and Arizona Rule 60(c). There is no mention whatsoever in either statute of any requirement of receiving permission from an appellate court in order to proceed in a separate action. *Rogers* follows a court-created doctrine mandating such a requirement, and cites a federal appellate case as the basis for this requirement. *See Rogers*, 416 P.2d at 595, *citing Butcher & Sherrerd v. Welsh*, 206 F.2d 259 (3d Cir. 1953). *Standard Oil*, decided after *Rogers*, is a United States Supreme Court case interpreting Federal Rule 60(b). *Standard Oil* pertains solely to the federal rule, while *Rogers* pertains solely to the Arizona rule. Inasmuch as *Rogers* relies on an

interpretation of the federal rule which has since been rejected by the U.S. Supreme Court, this Court questions whether *Rogers* is still good law in Arizona. Therefore, there is no conflict in the respective rules. Instead, the conflict arises in the case law interpreting the rules.

As discussed above, the *Erie* doctrine applies in this case. The case most applicable to this case is *Hanna*. In *Hanna*, the Court reasoned that if a Federal Rule of Civil Procedure is proper under the congressional mandate established in the Rules Enabling Act, and it did not transgress constitutional grounds, then the Federal Rule controls. *See Hanna*, 85 S. Ct. at 1140-45. Therefore, any proper Federal Rule of Civil Procedure controls. *Id.* The *Hanna* Court decided that the "outcome determination" test should be read with the twin aims of the *Erie* rule: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 1142. This analysis is essentially one which the Court must conduct for rules established under the Enabling Act, as opposed to the traditional analysis under the *Erie* rule. *See Id.* at 1143-44. Both analyses are classified under the general terms of the *Erie* doctrine. The specific test under the Enabling Act is that the court is to apply the Federal Rule, unless "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Id.* at 1144.

Federal Rule 60 was established pursuant to the Enabling Act. The FDIC has failed to prove that Federal Rule 60(b) transgresses the terms of the Enabling Act or constitutional restrictions. Furthermore, comparing the state and federal rules on their face, there appears to be no conflict. The apparent conflict is in the case law interpreting the rules. Applying the

case law to this case, the Court would be required to dismiss under the state rule, whereas the case would proceed under the federal rule. Ultimately, however, this Court would have to decide whether the Plaintiffs provided the Court with a prima facie proof of their case under the federal rule; if the Plaintiffs failed to provide a prima facie case, they lose. Therefore, there would not be a difference in either applying the federal rule or the *Rogers* case.

To hold otherwise would put this Court, and indeed other federal courts thrust into this situation, in an awkward situation. This Court would be required to follow a court-created doctrine and have to wait to get permission from a state court in order to pursue a federal case. This Court does not even want to speculate as to the myriad of issues and problems which could occur if this Court had to follow the *Rogers* rule. In regards to the potential for forum shopping, this Court believes that the *Rogers* rule would create a greater incentive for forum shopping. For example, if the Plaintiffs originally filed this suit in state court, and had the case stayed pending permission from the appellate court, the FDIC would be encouraged to race into the federal court simply to move to dismiss this matter altogether. Moreover, if this case was filed originally in federal court, this Court would be in an awkward position of seeking approval from a state court before proceeding in the federal case. Such a doctrine would encourage the FDIC to race to federal court in order to prevent a plaintiff from proceeding.

Alternatively, the FDIC could argue that to rule against them might allow the plaintiffs to prefer the federal court. As discussed above, there would be little difference between the ultimate resolution between the state court and the federal court. In either jurisdiction, the court would have to be reach the merits

of the case. Therefore, under the test elicited by *Hanna*, the Arizona Rule is procedural and the Federal rule controls.

This Court's holding is narrow — it does not preclude other potential issues and theories which may arise in a unique situation such as this. This Court does not wish to preclude the parties from raising any other issues which the parties may deem dispositive. Therefore, this Court finds that Federal Rule 60(b) controls in this case.

III. CONCLUSION:

Accordingly, IT IS ORDERED that Defendant's Motion to Dismiss is hereby DENIED.

Dated this 29th day of April, 1993.

s/ Alfredo C. Marquez
ALFREDO C. MARQUEZ
Senior Judge

Copies mailed this date to:

Conrad Herring
3525 Del Mar Heights Rd., #305
San Diego, CA 92130

K. Krasnow Waterman
One S. Church Ave.
P.O. Box 2265
Tucson, AZ 85702-2265

APPENDIX E — MINUTE ENTRY DATED JUNE 28, 1991

CONFIDENTIAL SUBJECT TO
PROTECTIVE ORDER OF THE
UNITED STATES DISTRICT COURT,
DISTRICT OF ARIZONA

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: *HON. J. RICHARD HANNAH* CASE NO. *197195*

Court Reporter: _____ DATE June 28, 1991

WALTER C. MADSEN, the Superintendent of Banks

Plaintiff

vs

SOUTHWESTERN BANK, an Arizona Banking Corporation

Defendant

* * *

MINUTE ENTRY

The Court finds and rules as follows on the receiver's petition for entry of an order approving a final liquidating dividend, payment of interest on claims, sale of any newly discovered assets and for termination of the receivership, and upon the objections by Mr. Burton on behalf of Morris Herring, et al:

Appendix E

1. The receiver is entitled to be paid interest on its claim, without offset or forfeiture.

2. Interest on all claims is properly calculated as simple interest and not compound interest. However, there are insufficient funds available to pay even simple interest.

3. Assuming arguendo that the receivership should have been concluded in 1985, as contended by the objectors, and that the FDIC is therefore entitled to interest only to that time, there are sufficient funds on hand to pay the FDIC simple interest to that date.

4. The funds available and to be distributed are in the amount of approximately $367,000.00, not $902,171.00 as contended by the objectors.

5. The disputed item of $530,124.00 consists of losses sustained on the liquidation of assets, and the receiver is not subject to surcharge for this amount. However, there are not sufficient funds to pay the interest to which the FDIC is entitled, or even interest to 1985, even if this item were to be disallowed.

6. There has not been a showing that the receiver violated any fiduciary duties.

7. Any objections not hereinabove dealt with were either abandoned or are without merit.

IT IS THEREFORE ORDERED that the receiver's petition is granted, that the objections are overruled and that the relief sought by the objecting parties is denied.

Appendix E

Counsel for the receiver is directed to prepare and submit to the Court an appropriate form of order for the Court's signature, compliance to be had with Rule 58(d) of the Rules of Civil Procedure. The Court sees no necessity for ordering a sealing of any portion of the record herein and finds that implementing such an order would be impractical. The Court does not see how there could be any liability for invasion of privacy by reason of the mention of transactions with individual customers in these proceedings. However, the Court is willing to consider a request to seal the exhibits offered into evidence at the hearing on the petition for termination of the receivership, to be opened only upon court order.

Copies to:

Hon. J. Richard Hannah
Osmond Burton, Jr., Esq., 80 S. Stone, Tucson, AZ, 85701
Brown & Bain, P.O. Box 400, Phoenix, AZ, 85001
Attention: Lawrence G.D. Scarborough, Esq.
Brown & Bain, 1 South Church, Tucson, AZ 85701
Attention: Karen Krasnow, Attorney at Law

Judy Carris
Deputy Clerk

Appendix E

TABLE

INTEREST CALCULATION FOR FDIC AND OTHER CLAIMANTS
OF SOUTHWESTERN BANK, #6373
(10% SIMPLE INTEREST)
9/26/81 THROUGH 7/23/90

DESCRIPTION	FDIC		OTHERS	
	INTEREST	PRINCIPAL	INTEREST	PRINCIPAL
ORIGINAL CLAIM AMOUNT AS OF 9/25/81		3,741,115.72		176,075.94
INTEREST FROM 9/26/81 THRU 9/25/82	374,111.57		17,607.59	
INTEREST FROM 9/26/82 THRU 9/25/83	374,111.57		17,607.59	
INTEREST FROM 9/26/83 THRU 9/25/84	374,111.57		17,607.59	
INTEREST FROM 9/26/84 THRU 2/14/85	145,544.78		6,850.08	
TOTAL INTEREST TO 1ST DIVIDEND	1,267,879.49		59,672.86	
1ST DIVIDEND PAYMENT 2/15/85		(2,843,247.95)		(133,817.71)
REMAINING CLAIM BALANCE 2/15/85		897,867.77		42,258.23
INTERRST FROM 2/15/85 THRU 9/25/85	54,856.03		2,581.80	
INTEREST FROM 9/26/85 THRU 7/13/86	71,583.43		3,369.08	
TOTAL INTEREST TO 2ND DIVIDEND	1,394,318.95		65,623.74	
2ND DIVIDEND PAYMENT 7/14/86		(785,634.30)		(37,045.18)
REMAINING CLAIM BALANCE 7/14/86		112,233.47		5,213.05
INTEREST FROM 7/14/86 THRU 9/25/86	2,275.42		105.69	
INTERRST FROM 9/26/86 THRU 9/25/87	11,223.35		521.30	
INTEREST FROM 9/26/87 THRU 9/25/88	11,223.35		521.30	
INTEREST FROM 9/26/88 THRU 9/25/89	11,223.35		521.30	
INTEREST FROM 9/26/89 THRU 7/23/90	9,255.42		429.90	
TOTAL INTEREST THRU 7/23/90	1,439,519.83		67,723.24	